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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE STATE OF ALABAMA, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 9) is reported in 38 F. (2d) 897.

JURISDICTION OF THIS COURT

The judgment of the Court of Claims was entered on March 12, 1930. (R. 30.) The petition for a writ of certiorari was filed on April 15, 1930. (R. 30.) The writ of certiorari was granted on June 2, 1930, 281 U. S. 718. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Court of Claims had jurisdiction of a suit by the State of Alabama to recover from the United States, which manufactures and sells hydroelectric power at Muscle Shoals in Alabama, a privilege or license tax imposed "upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama."

The petitioner has not discussed this jurisdictional question in its brief. It contends that the State may impose this privilege tax upon the United States. The Government in this brief confines its argument to the preliminary question of jurisdiction. We submit that this controls the instant case.

STATUTE INVOLVED

Section 145 of the Judicial Code (U. S. C., Title 28, Section 250) provides, in part:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to

redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

STATEMENT

The United States, having constructed a dam and power plant on the Tennessee River at or near Muscle Shoals, Alabama, under Congressional authority (Act of June 3, 1916, c. 134, Sec. 124, 39 Stat. 166, 215), has been engaged since 1925 in generating hydroelectric power. During the calendar year 1926 it sold to the Alabama Power Company, a private corporation, 429,311,000 kilowatt-hours of hydroelectric power so generated. (R. 6.)

On July 22, 1927, the legislature of the State of Alabama passed a revenue law which levied a license or privilege tax on each person or corporation engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama. This tax amounted to two-fifths of a mill upon each kilowatt-hour of hydroelectric power

manufactured and sold during the preceding calendar year. (R. 6.) The petitioner made demand on the United States for payment of the tax due in 1927. The United States declined to pay the tax. (R. 6, 7.)

This suit was thereafter filed by the petitioner in the Court of Claims to recover from the United States the amount of the tax for 1927 plus a penalty of 5%, for failure to pay the tax when due. The United States demurred to the petition on the ground that it did "not set forth a cause of action within the jurisdiction of" the Court of Claims. (R. 8.) The Court of Claims sustained the demurrer on the merits, holding the State tax an unconstitutional interference with the functions of the Federal Government, and dismissed the petition. (R. 22.) The petitioner thereupon petitioned to this Court for a writ of certiorari, which was granted, 281 U. S. 718.

ARGUMENT

We contend that the Court of Claims was without jurisdiction to consider the petition in this case and to determine the controversy on the merits. Under Section 145 of the Judicial Code (*supra*, pp. 2–3) that court is given jurisdiction, so far as the present question is concerned, to hear and determine:

> All claims * * * upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or

> unliquidated, in cases not sounding in tort, * * *.

A State may, like an individual, bring suit in the Court of Claims upon a proper cause of action. *United States* v. *Louisiana*, 123 U. S. 32. But the United States has not consented to be sued upon any ground alleged in the present petition, and without such consent the Court of Claims has no jurisdiction. *Schillinger* v. *United States*, 155 U. S. 163.

The petition states an alleged obligation to pay a privilege or license tax imposed by the legislature of Alabama upon the Federal Government. But such an obligation can not be said to result from "any contract, express or implied, * * *." It is not the result of agreement between the parties. Consequently, the Court of Claims had no jurisdiction; for, as stated by this Court in *Russell* v. *United States*, 182 U. S. 516, 530:

> To give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—"a coming together of minds."

A tax obligation is sometimes loosely spoken of as a debt, but it is not a debt based upon any contractual relationship. Cooley's treatise on Taxation (Fourth Edition 1924), Section 22, states:

> A tax is not regarded as a debt in the ordinary sense of that term, for the reason that a tax does not depend upon the consent of

> the taxpayer and there is no express or implied contract to pay taxes. Taxes are not contracts between party and party, either express or implied; but they are the positive acts of the government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required.

In the following cases State courts have discussed the nature of a tax obligation and decided that it is not founded on contract or agreement. *Camden* v. *Allen*, 26 N. J. L. 398; *Perry* v. *Washburn*, 20 Cal. 318; *Carondelet* v. *Picot*, 38 Mo. 125; *Nebraska City* v. *Gas Company*, 9 Nebr. 339; *Pierce* v. *City of Boston*, 3 Mete. (Mass.) 520; *Peter* v. *Parkinson, Treasurer*, 83 Ohio St. 36. This Court in *Lane County* v. *Oregon*, 7 Wall. 71, held that under the Acts of Congress of 1862 and 1863, making United States notes legal tender for debts, "debts" did not include tax obligations imposed by States, and quoted with approval the language used in *Camden* v. *Allen*, *supra*, that "a tax . . . is not founded on contract or agreement." To the same effect are *Meriwether* v. *Garrett*, 102 U. S. 472, 513; *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corp.*, 6 F. (2d) 752 (C. C. A. 2d), and *St. Joseph Land Co.* v. *MacLean*, 32 F. (2d) 984 (C. C. A. 8th).

It is clear that the petition in the Court of Claims is not founded on any express contract. It is equally clear that the petition is not founded upon

an implied contract, as that phrase is used in Section 145 of the Judicial Code. For, as this Court has said in *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217:

> An implied contract in order to give the Court of Claims or a District Court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law.

To the same effect are *Merritt* v. *United States*, 267 U. S. 338, 340; *Sutton* v. *United States*, 256 U. S. 575, 581; *Tempel* v. *United States*, 248 U. S. 121.

It is true that an action of debt or assumpsit may, under many circumstances, be brought for the recovery of a tax from a private party. See *United States* v. *Chamberlin*, 219 U. S. 250. But the fact that a private individual would be liable, under the same circumstances, in an action of assumpsit, does not bring the case within the jurisdiction of the Court of Claims. In *Merritt* v. *United States*, 267 U. S. 338, 341, this Court said:

> The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.

A similar statement was made by the Court in *Goodyear Tire & Rubber Co.* v. *United States*, 276 U. S. 287, 293.

CONCLUSION

The judgment in this case should be reversed and the cause remanded to the Court of Claims with directions to dismiss for want of jurisdiction.

Respectfully submitted.

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